

122 FERC ¶ 61,010  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

TransCanada Power Marketing Ltd.

Docket No. EL08-11-000

v.

ISO New England Inc.

ORDER GRANTING COMPLAINT

(Issued January 4, 2008)

1. On November 19, 2007, TransCanada Power Marketing Ltd. (TransCanada) filed a complaint requesting fast track processing<sup>1</sup> to require ISO New England Inc. (ISO-NE) to accept TransCanada's composite designation of 6.222 MW of qualified capacity as a Self-Supplied Forward Capacity Auction (FCA) Resource for participation in the first FCA of the New England Forward Capacity Market (FCM). In this order, we grant the complaint.

**I. Background**

**TransCanada's Complaint**

2. TransCanada<sup>2</sup> alleges that ISO-NE, in contradiction of the FCM Rules and the policies underlying the FCM, inappropriately de-listed a portion of TransCanada's capacity, thus making it ineligible to participate in the FCM's first FCA.

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<sup>1</sup> 18 C.F.R. § 385.206(h) (2007) provides that a complainant may request fast track processing.

<sup>2</sup> TransCanada, incorporated in Delaware, is a load-serving entity (LSE) in New England and a member of the New England Power Pool (NEPOOL).

3. TransCanada explains that in order to implement the FCM Settlement Agreement approved by the Commission<sup>3</sup> and establishing the FCM, ISO-NE filed proposed tariff changes to its Market Rule 1 that set forth the FCA participation procedures.<sup>4</sup> TransCanada explains that four provisions of the FCM Rules are relevant here: sections III.13.1.2.2.5.2,<sup>5</sup> III.13.1.5,<sup>6</sup> III.13.1.6<sup>7</sup> and III.13.1.6.1,<sup>8</sup> all of which pertain to (i) Offers Composed of Separate Resources or (ii) designations by LSEs of Self-Supplied Resources.

4. According to TransCanada, section III.13.1.2.2.5.2 provides that where an Existing Generating Capacity Resource has summer Qualified Capacity that exceeds its winter Qualified Capacity by a specified threshold, the resource must either offer its summer Qualified Capacity as part of an offer composed of separate resources or it must submit a Static or Permanent De-List Bid for at least the difference between the summer and winter Qualified Capacity. TransCanada further explains that section III.13.1.5 allows separate resources to participate together in an FCA and sets a deadline for the submission of a composite offer. TransCanada also states that section III.13.1.6 allows an LSE to designate capacity as a Self-Supplied Resource and sets a deadline for making that designation.

5. TransCanada argues that section III.13.1.6.1, which sets forth the procedures for designating capacity as a Self-Supplied FCA Resource, overrides the qualification procedures that otherwise would apply to different types of resources.

6. TransCanada states that on October 12, 2007 – five days before the deadline – it submitted self-supply forms to ISO-NE in compliance with section III.13.1.6 of the Market Rule 1 and ISO-NE training materials. The self-supply forms indicated that for

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<sup>3</sup> *Devon Power LLC*, 115 FERC ¶ 61,340 (2006), *order on reh'g*, 117 FERC ¶ 61,133 (2006).

<sup>4</sup> *See generally* section III.13.1.2.

<sup>5</sup> *Id.* at Exhibit 1.

<sup>6</sup> *Id.* at Exhibit 2.

<sup>7</sup> *Id.* at Exhibit 3.

<sup>8</sup> *Id.*

the winter period,<sup>9</sup> TransCanada wished to designate 4.437 MW of existing Qualified Capacity from Ocean State Power 2 (Asset ID 529) and 1.785 MW of existing Qualified Capacity from Ocean State Power 1 (Asset ID 528) for a total of 6.222 MW as self-supply resources. The self-supply forms also showed that for the summer period,<sup>10</sup> TransCanada wished to designate 4.437 MW of existing Qualified Capacity from Moore (Asset ID 496) and 1.785 MW of existing Qualified Capacity from Harriman (Asset ID 435) as self-supply resources, for a total of 6.222 MW. TransCanada claims that its timely submittal of the self-supply forms properly designated 6.222 MW of self-supply resources. TransCanada also claims that this submittal meets ISO-NE's requirements for a composite offer, as contemplated by sections III.13.1.2.2.5.2 and III.13.1.5 of Market Rule 1 and that ISO-NE rejected TransCanada's designation without taking into account all of the applicable rules.

7. On October 30, 2007, TransCanada received a message from an ISO-NE representative indicating that the self-supply designation did not meet the market rule requirements. TransCanada subsequently requested, and received, a written explanation from ISO-NE explaining why the designations allegedly violated the rules.

8. According to ISO-NE's October 31, 2007 response, the submittal itself was timely,<sup>11</sup> but, according to section III.13.1.2.2.5.2, "it is clear under these sections that using Self-Supply designations to match summer and winter increments from different resources is not contemplated."<sup>12</sup> The correspondence also suggested that because sections III.13.1.6 and III.13.1.6.1 do not discuss a resource being designated as self-supply for only part of a Capacity Commitment Period, submitting a composite offer of a Self-Supplied FCA Resource would not be allowed.<sup>13</sup>

9. In response to TransCanada's request for further clarification of the issue, by separate correspondence, ISO-NE's counsel explained that, under section III.13.1.5, separate resources seeking to participate together in the first FCA had to submit a composite offer form by July 2, 2007, which TransCanada had failed to do. ISO-NE's

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<sup>9</sup> *Id.* at Exhibit 5.

<sup>10</sup> *Id.* at Exhibit 6.

<sup>11</sup> *Id.* at Exhibit 7.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

counsel stated that the self-supply designations TransCanada submitted to ISO-NE on October 12, 2007 did not suffice to create a valid offer composed of separate resources.<sup>14</sup> Based upon that interpretation, therefore, the representative explained, ISO-NE would submit a Static De-List bid for the difference between TransCanada's resources' summer and winter Qualified Capacity at a price of 2.0 times the cost of new entry (CONE).<sup>15</sup>

10. TransCanada further argues that the claim that its designation was untimely is contradicted by the unambiguous language of sections III.13.1.6 and III.13.1.6.1. TransCanada claims that those provisions, as well as the ISO-NE training materials, demonstrate that the designation was submitted in a timely manner. TransCanada also argues that the de-listing contradicts the reasons why the FCM was developed, *i.e.*, to provide capacity in a market in which reserve margins are tight.

11. TransCanada argues that ISO-NE's alternative theories for rejecting the designation of separate resources as a Self-Supplied FCA Resource contradict the FCM Rules and ISO-NE's tariff. TransCanada disputes both explanations provided by the ISO and seeks to designate the 6.222 MW of Qualified Capacity as a Self-Supplied FCA Resource for participation in the first FCA.

## **II. Notice, Interventions, Comments and Answers**

12. Notice of TransCanada's complaint requesting fast track processing was published in the *Federal Register*, 72 Fed. Reg. 67601 (2007), with comments and interventions due on or before December 3, 2007. A timely motion to intervene with comments was filed by NEPOOL.

13. NEPOOL urges a decision that does not delay the February 4, 2008 FCA. NEPOOL notes that the Market Rules filed by ISO-NE and accepted by the Commission pursuant to the FCM Settlement Agreement, including those setting forth the qualifications for participation in the FCA, were fully vetted through the NEPOOL Participant Process. NEPOOL also states that subsequent to the filing of the Market Rules in February, ISO-NE and NEPOOL worked closely together to inform and guide Participants through the Composite Offer process and that TransCanada was invited to participate in the related sessions.

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<sup>14</sup> *Id.* at 1.

<sup>15</sup> *Id.*

14. On November 30, 2007, ISO-NE filed its answer to the complaint (ISO-NE November Answer). On December 4, 2007, TransCanada filed a motion for leave to reply and reply (TransCanada Reply) to ISO-NE's answer and NEPOOL's motion and on December 7, 2007, ISO-NE filed a Motion for Leave to Answer and Answer (ISO-NE December Answer).

### **ISO-NE's November Answer**

15. ISO-NE notes that it is undisputed that the two resources in question have a higher summer Qualified Capacity than winter Qualified capacity. ISO-NE argues that TransCanada failed to properly submit an offer composed of separate resources and did not itself submit a de-list bid for the excess Qualified Capacity. ISO-NE explains that the determination to submit a Static De-List Bid at a price of 2.0 CONE for each of the two resources at issue is consistent with – and required by – the FCM Rules.<sup>16</sup>

16. ISO-NE explains that section III.13.1.5 of Market Rule 1 contains specific provisions regarding the submission of a composite offer, as is the case here with the resources TransCanada offered. ISO-NE states that section III.13.1.5 requires that: (i) all offers composed of separate resources be detailed in a composite offer form; and (ii) that the composite offer form must be submitted to ISO-NE no later than July 2, 2007 for the first FCA.<sup>17</sup> ISO-NE notes that TransCanada did not submit composite offer forms for the resources at issue by July 2, 2007 (or ever), as required by section III.13.1.5 of the FCM Rules.

17. ISO-NE further explains that section III.13.2.1.6 of the FCM Rules contains specific provisions regarding the designation of a resource as a Self-Supplied FCA Resource. According to ISO-NE, section III.13.2.1.6 clearly states that where a Project Sponsor (TransCanada) chooses to designate a resource as a Self-Supplied Resource, that designation must be made, in writing, to ISO-NE “no later than the date by which the Project Sponsor [TransCanada] is required to submit the financial assurance deposit.”<sup>18</sup> ISO-NE identifies that deadline as October 17, 2007, which correlates with the first Forward Capacity Auction that is at issue here.

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<sup>16</sup> ISO-NE November 30, 2007 Answer at 5 (Answer) (*citing* section III.13.1.2.2.5.2 of the ISO-NE Transmission, Markets and Services Tariff, FERC Electric Tariff No. 3 (Tariff)).

<sup>17</sup> Answer at 7 (*citing* Tariff at section III.13.1.5).

<sup>18</sup> *Id.* (*citing* Tariff at section III.13.1.6).

18. ISO-NE argues that there is no mechanism in the rules by which the Self-Supplied FCA Resource designations can be used to create an offer composed of separate resources. ISO-NE further argues that the rules regarding Self-Supplied FCA Resources do not supersede the requirements associated with composite offers.

19. ISO-NE explains that on October 12, 2007, TransCanada submitted self-supply designation forms for four of its resources. ISO-NE concedes that these forms were timely filed to effectuate TransCanada's self-supply designations. However, ISO-NE notes that in the covering e-mail submitting those forms, TransCanada indicated that it wanted to use those resources to designate just two self-supplied resources, each comprised of one summer resource and one winter resources. The two "summer" resources were resources that each had a summer Qualified Capacity that exceeded its winter Qualified Capacity, and each was "paired" with like amounts of winter capacity from the two other resources submitted. ISO-NE argues, therefore, that although the total amount of capacity indicated in the self-supply designation forms for the four resources was 12.444 MW, TransCanada indicated in the e-mail that it sought to create just two composite Self-Supplied FCA Resources for a total of 6.222 MW.

20. ISO-NE argues that TransCanada's October 12, 2007 submission was deficient with respect to the requirements for creating an offer composed of separate resources found in section III.13.1.5. ISO-NE disagrees with TransCanada's argument that the language of section III.13.1.6 allows a composite offer that is associated with a self-supply designation to be submitted at the later self-supply designation deadline (October 17, 2007), rather than at the earlier composite offer deadline (July 2, 2007).

21. ISO-NE argues that there is no inconsistency between the rationales provided to TransCanada by the various ISO-NE representatives and that both explanations are accurate and consistent. ISO-NE explains that the ISO-NE personnel simply focused on different facets of TransCanada's failure.

22. ISO-NE explains that the first response addresses why TransCanada's October 12, 2007 submission did not meet the requirements of the self-supply provisions. This response explains that all resources in the FCA (except intermittent resources) must be annual resources, that is, they must be able to provide capacity for the entire one-year Capacity Commitment Period. ISO-NE states that on its face, TransCanada's submission requested that each of four resources be designated as a Self-Supplied FCA Resource for part of the year: two resources were designated as self-supplied for the summer, and two were designated as self supplied for the winter. ISO-NE explains that effectuating TransCanada's self-supply designations, as requested, would have required either: (i) four partial year Self-Supplied FCA Resources, or (ii) two full-year Self Supplied FCA Resources with the self-supplied capacity to be transferred among resources during

the year. ISO-NE explains that its representative correctly indicated that neither of those approaches is permitted under the FCM Rules.<sup>19</sup>

23. ISO-NE explains that its second response describes why the October 12, 2007 submission did not meet the requirements of the composite offers provisions. ISO-NE explained that TransCanada did not submit a composite offer form by July 2, 2007 and therefore the submission did not comply with section III.13.1.5 and did not suffice to create a valid offer composed of separate resources.<sup>20</sup>

24. ISO-NE argues that it has applied the FCM Rules as approved by the Commission and that there is no relevancy to TransCanada's arguments regarding the purposes underlying the creation of the FCM. ISO-NE maintains that there is no ambiguity between the composite offer requirements of section III.13.1.5 and the self-supply provisions of section III.13.1.6. ISO-NE argues that, if TransCanada found that the provisions were ambiguous or confusing, it should have mitigated its risk by filing a composite offer form by July 2, 2007 or by approaching ISO-NE for an explanation. ISO-NE notes that it has worked exhaustively with stakeholders on the qualification provisions of the FCM and specifically on the composite offer deadlines and requirements, thus TransCanada was provided with multiple opportunities to avoid this litigation.

### **III. Discussion**

#### **Procedural Matters**

25. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the timely, unopposed motions to intervene of NEPOOL serve to make it a party to the proceeding.

26. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept TransCanada's reply or ISO-NE's December answer and will, therefore, reject them.

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<sup>19</sup> Answer at 14-15.

<sup>20</sup> Answer at 16 and n.24.

### **Commission Determination**

27. The Commission grants TransCanada's complaint, and finds that ISO-NE has not met its burden of showing that TransCanada has not complied with the FCM Rules and requires ISO-NE to include TransCanada's composite offer of 6.222 MW of existing qualified capacity as a self-supplied FCA resource for participation in the first FCA. As discussed below, we find that the relevant provisions of the FCM Rules are ambiguous and that TransCanada's interpretation of the requirements is reasonable and not inconsistent with the Tariff.

28. The Commission agrees that the 6.222 MW offered by TransCanada from each of its four resources – Ocean State Power 1 and 2, Harriman, and Moore – represents a composite offer under the FCM Rules. TransCanada failed to follow the requirements of section III.13.1.5 of Market Rule 1 in that it failed to submit a composite offer form detailing the separate resources by July 2, 2007 for inclusion in the first FCA. We note however that TransCanada properly complied with the FCM Rules applicable to self-supplied resources found in section III.13.1.6. We also note that ISO-NE properly qualified that capacity – including the 6.222 MW that represents the difference between TransCanada's summer and winter qualified capacity for two of TransCanada's existing resources – as a self-supplied resource for the first FCA.

29. The language of the rules would seem to permit both readings: the approach undertaken by ISO-NE (namely, that if a party seeks to both self-supply and make a composite offer, it is required to comply with the separate requirements found in sections III.13.1.5 and III.13.1.6), and TransCanada's interpretation (that it only needed to follow the rules for self-supply). Neither the FCM Rules nor the FCM Settlement Agreement specifically addresses a situation in which self-supplied resources are combined in a composite offer. The language of these two sections – III.13.1.5 and III.13.1.6 – when read together provide for two alternative plausible approaches and is therefore ambiguous. We therefore order ISO-NE to amend the FCM Market Rules, as discussed below.

30. The Commission will find that a tariff is ambiguous when its language is reasonably susceptible to different interpretations.<sup>21</sup> We find that the FCM Rules are ambiguous as to the procedures under section III.13.1.6 that parties, such as TransCanada, must follow to designate composite resources as self-supplied resources for inclusion in the FCA.

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<sup>21</sup> See, e.g., *New York Independent System Operator, Inc. v. Astoria Energy LLC*, 118 FERC ¶ 61,216, at P 34-36 (2007).



31. Therefore, based upon the specific and unique facts presented above, we will grant TransCanada's complaint. We recognize that the FCM Rules relevant to this proceeding are not clear. We will therefore direct ISO-NE to amend the self-scheduling language found in section III.13.1.6, within 60 days of the date of this order, to clearly indicate that in the event that a party seeks to self-schedule composite resources, that party must comply with the provisions of section III.13.1.5 in addition to the requirements found in section III.13.1.6. We will also direct TransCanada to file composite offer forms in compliance with section III.13.1.5 of the FCM Rules, within 7 days of the date of this order.

32. We find that granting TransCanada's complaint will have no adverse impact on the timing of the first FCA, any third parties or the market. We note that ISO-NE did not indicate that it will be unable to substitute a composite offer for the 6.222 MW at issue here as replacement for the current de-list bid of 2.0 x CONE. We note, however, that should ISO-NE require additional information from TransCanada in order to make this substitution, TransCanada must comply with ISO-NE's request in an expeditious fashion so that the FCA will not be affected.

33. We emphasize the importance of enforcing the FCM Rules in order to effectively administer the markets in New England. However, we recognize, as acknowledged by ISO-NE, that the FCA is a new process for all parties involved, and participants are still becoming familiar with the rules. We also recognize that the FCM is significantly different from the regulatory regime that preceded it. Furthermore, given that neither ISO-NE, nor any other party, has provided evidence that TransCanada's request will have an adverse effect on the FCA, the Commission finds that granting TransCanada's complaint is appropriate. We note, however, that the latitude provided by the Commission here in the application and interpretation of the FCM Rules will be limited to controversies arising with regard to the first FCA.

The Commission orders:

(A) TransCanada's complaint is hereby granted, as discussed in the body of this order.

(B) We direct TransCanada to file within 7 days of the date of this order, composite offer forms in compliance with section III.13.1.5 of the FCM Rules.

(C) We direct ISO-NE to file within 60 days of the date of this order, the revisions as discussed in the body of this order, including filing to revise section III.13.1.6 of the FCM Rules to provide that with respect to parties that seek to self-schedule composite resources, those parties must comply with section III.13.1.5.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.